Maju Holdings Sdn Bhd v Kamala Devi a/p Ramadass & Anor and another appeal

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEALS NO W-02-459 AND W-02-460 OF 2001
MOKHTAR SIDIN, MOHD SAARI AND ALAUDDIN JJCA
29 NOVEMBER 2002

Evidence *— Documentary evidence — Bankers' books — Whether the documents, correspondence and books in connection with the shareholding in a company were bankers' books — Whether s 130(3) of the Evidence Act 1950 was applicable — Whether ss 97(2), 98 and 99 of the Banking and Financial Institutions Act 1989 were applicable — Evidence Act 1950 s 130(3) — Banking and Financial Institutions Act 1989 ss 97(2), 98 and 99*

Evidence *— Documentary evidence — Proof should be by maker — Whether first respondent was the maker or the person in charge of the making of a substantial number of the documents*

Evidence *— Witness — Compellability — Whether the first respondents could be compelled to testify as to the production of documents and orally*

There were two appeals before the court. Since the issues, parties and counsel in both appeals were similar, the court proceeded to hear them together. The second respondent (Fortune Wealth) issued proceedings against the appellant (Maju Holdings) for an alleged breach of a call and put agreement, ie the appellant failed to pay for 'put' shares. The appellant stated that it exercised its common law option to avoid the agreement upon the discovery that the second respondent was merely a nominee of one Koh Kim Teck. At the High Court hearing, the appellant took out subpoenas against the first respondents, Kamala Devi (on 15 December 2000) and Erdmann Vogt (on 24 April 2001) ordering them to attend hearing to give evidence for the defence and to produce all documents, correspondence and books in connection with the shareholding in Ipmuda Bhd by Koh Kim Teck, Fortune Wealth (Hong Kong) Ltd and/or the bank from the month of March 1997. Both the first respondents took out separate summonses to have the subpoenas struck off on the grounds, inter alia, that the said subpoenas were too wide and unlimited, the information was already available through Ipmuda's company secretary; the subpoenas were an attempt at discovery of documents from parties who were not parties to these proceedings and was an abuse of the process of court and s 97(1) of the Banking and Financial Institutions Act 1989 ('BAFIA') contained a restriction against any disclosure of information pertaining to the affairs or account of the bank's customers. The learned judge allowed the applications by the first respondents. The appellant stated in its appeal that, inter alia, the learned judge erred in holding that the first respondents could not be compelled by subpoena to testify as to the production of documents and orally, and did not appreciate that the

privilege under s 97(1) of BAFIA did not apply to the information and documents sought and the learned judge failed to consider or failed to sufficiently consider the following: (1) that the evidence sought from the first respondents was relevant; (2) that the first respondent was the maker or the person in charge of the making of a substantial number of the documents; (3) that the application was improper, (4) that s 130(3) of the Evidence Act 1950 did not apply as the documents were not 'bankers' books'; and (5) that the first respondents could not rely on s 97(1) of BAFIA. Also the learned judge erred in setting aside the writ of subpoena *ad testificandum* and *duces tectum*.

Held, dismissing the appeal with costs to the first respondents on a higher scale:

(1) From the appeal record, the first respondent was prepared to release to the appellant the various Forms 29 in the manner set out in O 38 r 16(2) of the Rules of the High Court 1980. The various Forms 29 spoke for themselves as to the beneficial ownership of the shares in Ipmuda Bhd which information was required by the appellants. It was sufficient for the first respondent to have just produced the documents in compliance with O 38 r 16(2). That in itself would have satisfied the appellant's request (see p 44F–G).

(2) Section 97(1) of BAFIA contains an absolute prohibition on the director or any officer of the bank from producing, revealing or disclosing to any person any information or document whatsoever relating to the affairs or account of the customer. The various Forms 29 spoke for themselves as to the beneficial ownership of the shares in Ipmuda and this information could have readily been obtained by the appellant from the company secretary of Ipmuda Bhd. There was really no necessity on the part of the first respondent to comply with the writ of subpoena *duces tecum* (see pp 44H, 45A–B).

(3) The appellant wanted the first respondent to testify on matters beyond what appeared on the face of the documents. This would clearly have been in breach of s 97(1) of BAFIA. The appellant's contention that s 97(2) permitted such evidence to be given was totally misconceived because the testimony so required of the first respondent went far beyond what appeared on the face of the documents, ie Forms 29, in that such testimony would have enabled information relating to a particular customer of the bank to be ascertained from it. Certainly, both s 97(1) and (2) of BAFIA prohibited this. Section 97(2) only opened the way for the admission of Forms 29 under the writ of subpoena *duces tecum* (see pp 46A–C).

(4) The exceptions to s 97(1) of BAFIA, namely ss 98 and 99 were also not applicable on the facts of the present appeal. The first respondent was absolutely prohibited from giving oral testimony

on matters relating to the accounts of a customer of the bank (see p 46D). A

(5) The failure on the part of the learned judge, as contended by the appellant, would not have in any way affected his decision for the following reasons: (1) notwithstanding the relevancy of the evidence sought to be produced through the first respondent, this must necessarily have been subjected to any statutory prohibition as to its admissibility; (2) the first respondent was not the maker of the documents sought to be produced. The various Forms 29 were prepared by the global securities services department of the bank based on the computer records of the bank. Thus, the evidence sought to be adduced through the first respondent was not the best evidence; (3) the persons who were in a better position to testify as to the facts sought by the appellant would have been the company secretary of Ipmuda Bhd and/or the said Koh Kim Teck himself; (4) from the wordings of s 162 of the Evidence Act 1950, it appeared to apply only to the production of documents and not to the giving of oral testimony by a witness. The appellant's contention in respect of this aspect of the said section was again misconceived. The learned judge need not have given any regard to this provision but needed only to consider s 97(1) of BAFIA in determining whether the first respondent ought to have been subpoenaed as a witness to testify on matters relating to an account of a customer of the bank where the bank was not a party to the proceedings. The issuance of the said writ of subpoena was an abuse of the process of court. The learned trial judge was therefore absolutely correct in setting aside the writ of subpoena; and (5) under the definition in s 2 of the Banker's Books (Evidence) Act 1949, all books relating to the bank's business would be covered under these terms. A proper reading of s 130(3) of the Evidence Act 1950 which stipulates that 'no bank shall be compelled to produce its books in any legal proceeding to which it is not a party' can only have led to the conclusion that bankers could not be made to divulge any of its books (see pp 46F–47F). B C D E F G

[Bahasa Malaysia summary

Terdapat dua rayuan di hadapan mahkamah. Memandangkan isu-isu, pihak-pihak dan peguam-peguam bagi kedua-dua rayuan adalah serupa, mahkamah telah mendengar kedua-dua rayuan serentak. Responden kedua (Fortune Wealth) telah memulakan prosiding terhadap perayu (Maju Holdings) bagi pelanggaran perjanjian 'call and put', iaitu perayu telah gagal membayar untuk saham put. Perayu telah berkata bahawa beliau telah menggunakan pilihan common law beliau untuk membatalkan perjanjian tersebut setelah mengetahui bahawa responden kedua hanya merupakan penerima namaan Koh Kim Teck. Di pendengaran di Mahkamah Tinggi, perayu telah H I

mengeluarkan sepina-sepina terhadap responden-responden pertama, Kamala Devi (pada 15 Disember 2000) dan Erdmann Vogt (24 April 2001) memerintahkan mereka supaya hadir pada pendengaran untuk memberi keterangan bagi pihak pembelaan dan untuk mengemukakan semua dokumen-dokumen, surat-menyurat dan buku-buku yang berkenaan pegangan saham di dalam Ipmuda Bhd oleh Koh Kim Teck, Fortune Wealth (Hong Kong Ltd) dan/atau bank tersebut daripada bulan Mac 1997. Kedua-dua responden pertama telah mengeluarkan saman masing-masing untuk mengenepikan sepina-sepina tersebut berdasarkan alasan-alasan yang antara lainnya bahawa sepina-sepina tersebut adalah terlalu luas dan tidak terbatas, maklumat tersebut boleh didapatkan daripada setiausaha syarikat Ipmuda; sepina-sepina tersebut merupakan percubaan penzahiran dokumen-dokumen kepunyaan pihak yang bukan merupakan pihak di dalam prosiding dan merupakan penyalahgunaan proses mahkamah dan s 97(1) Akta Bank dan Institusi-Institusi Kewangan 1989 ('ABDIK') mempunyai batasan ke atas sebarang pendedahan maklumat yang berkenaan urusan atau akaun pelanggan bank. Hakim yang arif telah membenarkan permohonan-permohonan responden-responden pertama. Perayu telah mengatakan di dalam rayuan beliau bahawa, antara lainnya, hakim yang arif telah terkhilaf dengan memutuskan bahawa responden-responden tidak dapat dipaksa oleh sepina untuk memberi keterangan mengenai pengemukaan dokumen-dokumen dan secara lisan, dan tidak menyedari bahawa keistimewaan di bawah s 97(1) ABDIK tidak terpakai kepada maklumat dan dokumen-dokumen yang dikehendaki dan hakim yang arif telah gagal untuk menimbang atau gagal untuk menimbang dengan secukupnya yang berikut: (1) bahawa keterangan yang dikehendaki daripada responden-responden pertama adalah relevan; (2) responden pertama merupakan pembuat atau orang yang bertanggungjawab dalam pembuatan sebahagian besar dokumen-dokumen; (3) bahawa permohonan tersebut tidak betul; (4) bahawa s 130(3) Akta Keterangan 1950 tidak terpakai kerana dokumen-dokumen tersebut bukan merupakan 'bankers' books'; dan (5) bahawa responden-responden pertama tidak dapat bergantung kepada s 97(1) ABDIK. Hakim yang arif telah terkhilaf dalam mengenepikan writ sepina *ad testificandum* dan *duces tectum*.

Diputuskan, menolak rayuan dengan kos kepada responden pertama pada skala lebih tinggi:

(1) Daripada rekod rayuan, responden pertama sedia memberi Borang-Borang 29 kepada perayu seperti yang diperuntukkan di dalam A 38 k 16(2) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Borang-Borang 29 dengan nyata menjelaskan pemunyaan benefisial saham-saham di dalam Ipmuda Bhd, maklumat yang diperlukan oleh perayu. Adalah mencukupi bagi responden-responden pertama untuk mengemukakan dokumen-

dokumen mengikut A 38 k 16(2). Ini akan memenuhi permintaan perayu (lihat ms 44F–G). A

(2) Seksyen 97(1) ABDIK mempunyai larangan ke atas pengarah ataupun pegawai bank daripada mengemukakan atau mendedahkan maklumat yang berhubung dengan urusan atau akaun pelanggan bank. Borang-Borang 29 dengan jelas menerangkan pemunyaan benefisial saham-saham di dalam Ipmuda Bhd dan maklumat ini boleh didapatkan oleh perayu daripada setiausaha syarikat Ipmuda Bhd. Responden pertama tidak perlu mematuhi writ sepina *duces tecum* tersebut (lihat ms 44H, 45A–B). B C

(3) Perayu menghendaki responden pertama memberi keterangan mengenai perkara-perkara yang melebihi apa yang terdapat pada dokumen-dokumen tersebut. Ini merupakan pelanggaran s 97(1) ABDIK. Hujah perayu bahawa s 97(2) membenarkan keterangan sebegitu diberikan adalah tersalah tafsir kerana testimoni yang diperlukan daripada responden pertama melebihi apa yang terdapat pada dokumen-dokumen tersebut, iaitu Borang-Borang 29, memandangkan bahawa testimoni sebegitu akan membolehkan maklumat mengenai seseorang pelanggan bank diketahui. Sememangnya, kedua-dua s 97(1) dan (2) melarang perkara sedemikian. Seksyen 97(2) hanya membenarkan kemasukkan Borang-Borang 29 di bawah writ sepina *duces tecum* (lihat ms 46A–C). D E

(4) Pengecualian kepada s 97(1) ABDIK, iaitu ss 98 dan 99 tidak terpakai pada fakta-fakta rayuan semasa. Responden pertama dilarang daripada memberi keterangan secara lisan berhubung dengan perkara-perkara berkenaan akaun pelanggan bank tersebut (lihat ms 46D). F

(5) Kegagalan hakim yang arif, seperti yang dikatakan oleh perayu, tidak mempengaruhi keputusan beliau atas sebab-sebab berikut: (1) walau apa pun kerelevanan keterangan yang dikehendaki dikemukakan melalui responden pertama, ini mesti tertakluk kepada sebarang larangan undang-undang bertulis ke atas kebolehterimaannya; (2) responden pertama bukan merupakan pembuat dokumen-dokumen yang hendak dikemukakan itu. Borang-Borang 29 telah dibuat oleh bahagian perkhidmatan sekuriti sedunia bank tersebut berdasarkan rekod-rekod komputer bank. Oleh itu, keterangan yang dikehendaki dikemukakan melalui responden pertama bukan merupakan keterangan terbaik; (3) orang yang boleh memberi keterangan dengan lebih baik mengenai fakta-fakta yang dikehendaki oleh perayu adalah setiausaha syarikat Ipmuda Bhd dan/atau Koh Kim Teck sendiri; (4) daripada susunan kata-kata s 162 Akta Keterangan 1950, ia seakan-akan terpakai hanya kepada pengemukaan dokumen-dokumen dan bukan kepada pemberian keterangan secara lisan oleh seseorang saksi. Hujahan perayu G H I

mengenai aspek seksyen ini merupakan satu salah tanggapan. Hakim yang arif tidak perlu memberi perhatian kepada peruntukkan ini tetapi hanya perlu menimbang s 97(1) ABDIK untuk menentukan sama ada responden pertama patut disepinakan sebagai saksi untuk memberi keterangan berkenaan perkara-perkara yang berhubung dengan akaun seorang pelanggan bank di mana bank bukan merupakan parti kepada prosiding. Pengeluaran writ sepina merupakan penyalahgunaan proses mahkamah. Hakim perbicaraan adalah betul dalam mengenepikan writ sepina; dan (5) di bawah tafsiran di dalam s 2 Akta Buku Bank (Keterangan) 1949, segala buku-buku yang berhubung dengan perniagaan bank akan termasuk di dalam terma-terma ini. Tafsiran betul s 130(3) Akta Keterangan 1950 yang memperuntukkan bahawa 'no bank shall be compelled to produce its books in any legal proceeding to which it is not a party' hanya dapat membawa kepada kesimpulan bahawa pengurus-pengurus bank tidak boleh dipaksa untuk mendedahkan sebarang buku-buku bank (lihat ms 46F–47A).

Notes

For cases on bankers' books, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 1008–1013.

For cases on proof should be by maker, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue), para 1099.

For cases on compellability of witness, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue), para 2393.

Cases referred to

Chow Siew Woh v Public Prosecutor [1967] 1 MLJ 228 (refd)

KPM Khidmat Sdn Bhd v Tey Kim Suie [1994] 2 MLJ 627 (refd)

Tan Siew Sin v Hasnul bin Abdul Hadi; Re application of Tun (Dr) Ismail & Anor [1967] 2 MLJ 191 (refd)

Wong Sin Chong & Anor v Bhagwan Singh & Anor [1993] 3 MLJ 679 (refd)

Legislation referred to

Bankers' Books (Evidence) Act 1949 s 2

Banking and Financial Institutions Act 1989 ss 97(1), (2), 98, 99

Evidence Act 1950 ss 130, (3), 131, 162

Rules of the High Court 1980 O 38 r 16(2)

Appeal from: Suit No D6–22–1635 of 1998 (High Court, Kuala Lumpur)

David Morais (*Gurmel Singh* and *Khabir Dhillon* with him) (*Mohamad Illiyas & Co*) for the appellant.

Lee Wooi Mien (*Lai Wai Fong* with him) (*Shook Lin & Bok*) and *Dato' VK Lingam* (*VK Lashmi* with him) (*VK Lingam & Co*) for the respondents.

Alauddin JCA (delivering judgment of the court): Both these appeals are against the decision of the High Court, Kuala Lumpur given on 28 April 2001 which set aside two subpoenas *ad testificandum* and *duces tecum* ('the subpoenas') couched in similar terms issued against the following persons:

(i) in respect of Civil Appeal No W–02–459 of 2001, against the first respondent ('Erdmann Vogt') by a writ of subpoena dated 24 April 2001; and

(ii) in respect of Civil Appeal No W–02–460 of 2001, against the first respondent ('Kamala Devi') by a writ of subpoena dated 13 December 2000.

A brief account of the dispute between the appellant (Maju Holdings) and the second respondent (Fortune Wealth) is as follows.

The second respondent issued proceedings against the appellant for an alleged breach of a call and put option agreement ('the agreement') purportedly dated 1 April 1997. The agreement was intended as a means of financing the acquisition by the appellant of shares in Ipmuda Bhd ('the shares'). Under the agreement, the second respondent has the option during the option period to put to the appellant the shares at a predetermined price. It is the alleged failure by the appellant to pay for the 'put' shares that has given rise to this action. The appellant in its defence, inter alia, pleaded that the agreement had been repudiated when it had exercised its common law option to avoid the same upon discovery that the second respondent was merely a nominee of one Koh Kim Teck. This common law right exists as at all material times Koh Kim Teck was an agent of the appellant to arrange the financing of the transaction through the agreement but did not at any time disclose to the appellant his beneficial interest in the shares. In short, the appellant says that Koh Kim Teck and not the second respondent was the beneficial owner of the shares. Under the law, he ought to have disclosed that beneficial interest. His beneficial interest was further put squarely into issue during the cross-examination of PW1, one Ms Loke Foong Meng.

At the hearing before the High Court, the second respondent after having led evidence through PW1 and PW2, intimated to the court that they were closing their case. It was at this juncture that the appellant took out the subpoenas against the first respondents. The subpoenas were served on Kamala Devi on 15 December 2000 and Erdmann Vogt on 24 April 2001. By the said subpoenas, both the first respondents were ordered to attend hearing on a certain date and so from day to day until the end of the proceedings 'to give evidence for the defendant' and to produce 'all documents, correspondence and books in connection with the shareholding in Ipmuda Bhd by Koh Kim Teck, Fortune Wealth (Hong Kong) Ltd and/or the bank from the month of March 1997 until now'.

Both the first respondents took out separate summonses to have the said subpoenas struck off on the grounds:

(i) that the said subpoenas on the face of it are too wide and unlimited in that they are asking the witnesses to produce all documents, correspondence, books and other statements relating to the shareholdings of one Mr Koh Kim Teck in Ipmuda Bhd; and which information was in fact readily and presently available to the appellant through Ipmuda's company secretary, the company in which the appellant itself has a substantial shareholding and sharing a common chairman in the person of Tan Sri Abdul Sahid Muhamad;

(ii) that the issuance of these subpoenas were made in futility by the appellant 'on a fishing expedition'. It was an attempt at discovery of documents from parties who are not even parties to these proceedings; and the call under the subpoenas is an abuse of the process of court and should be set aside;

(iii) thirdly, and most important of all is s 97(1) of the Banking and Financial Institutions Act 1989 ('BAFIA'). BAFIA is an act specifically passed to regulate the business and affairs of the banking industry and s 97(1) contains a restriction against any disclosure of information pertaining to the affairs or account of the bank's customers.

Having heard and considered the arguments put forward by both sides, the learned judge of the High Court allowed the applications by the first respondents and set aside the subpoenas. Hence the present appeals. As the issues, parties and counsel in both these appeals were similar, we proceeded to hear them together. However, for the purpose of this judgment, we would only confine ourselves to Civil Appeal No W–02–460 of 2001. The parties have agreed that the decision in this appeal would bind them in the other.

Before us the decision of the learned judge was attacked on the following grounds:

(1) that the learned judge erred in holding that the first respondents could not be compelled by subpoena to testify as to the production of documents and orally under the provisions of ss 130 and 131 of the Evidence Act 1950, read together with s 97(1) of BAFIA and in so doing failed to appreciate that the privilege under s 97(1) of BAFIA did not apply to the information and documents sought from the first respondents under the provisions of s 97(2) of BAFIA;

(2) that the learned judge erred in failing to consider or sufficiently consider the following factors:

2.1 that the evidence sought to be adduced from the first respondent is directly relevant to the facts in issue, particularly as to the beneficial ownership of 1,646,000 shares of Ipmuda Bhd held on trust by DB (Malaysia) Nominee (Tempatan) Sdn Bhd, a wholly owned subsidiary of Deutsche Bank (Malaysia) Bhd;

2.2 that the relevance of the first respondent's evidence is particularly important given that she is the maker or the person having charge of the making of a substantial number of the documents sought to be adduced;

2.3 that the application is improper or otherwise premature as any objection on the admissibility or production of the evidence ought properly be taken during the examination of the first respondent pursuant to s 162 of the Evidence Act 1950 and the proper practice and procedure of court; A

2.4 that s 130(3) of the Evidence Act 1950 does not apply in the present circumstances — as the documents subpoenaed are not "bankers' books" as defined in s 2 of the Bankers' Books (Evidence) Act 1949; and B

2.5 that the first respondent cannot rely on s 97(1) of BAFIA as the documents subpoenaed fall within the exception in s 97(2) of BAFIA. C

(3) That in all the circumstances of the case the learned judge erred in setting aside the writ of subpoena *ad testificandum* and *duces tecum* dated 13 December 2000 issued against the first respondent.

Subpoena duces tecum D

We shall begin by first considering the writ of subpoena *duces tecum*. Order 38 r 16(2) of the Rules of the High Court 1980 ('the RHC') provides as follows:

> 16 Writ of subpoena duces tecum (O 38 r 16) E
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> (1) A writ of subpoena duces tecum must contain the name of one person only.
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> (2) Any person served with a writ of subpoena duces tecum shall sufficiently comply if he causes the document to be produced without attending personally.

From the appeal record, at p 161, it appears obvious to us that the first respondent was prepared to release to the appellant the various Forms 29 in the manner set out in O 38 r 16(2) of the RHC referred to above. The various Forms 29 speak for themselves as to the beneficial ownership of the shares in Ipmuda Bhd which information was required by the appellant. But the appellant was not satisfied with the first respondent merely complying with O 38 r 16(2) of the RHC. They wanted to examine her in court. On the facts of the present case, we hold that it would be sufficient for the first respondent to just produce the documents in compliance with O 38 r 16(2) of the RHC. That in itself would satisfy the appellant's request. F G

Next, s 97(1) of BAFIA contains an absolute prohibition on the director or any officer of the bank from producing, revealing or disclosing to any person any information or document whatsoever relating to the affairs or account of the customer. However, as suggested by the appellant, the documents sought to be produced here are not those prohibited by s 97(1). As a matter of fact, they come within the exception under sub-s 2 of s 97 which provides: H I

> This section shall not apply to information or document which at the time of disclosure is, or has already been made, lawfully available to the public from

> any source other than the licensed institution, or to any information which is in the form of a summary or collection of information set out in such manner as does not enable information relating to any particular licensed institution or any particular customer of the licensed institution to be ascertained from it.

As we have mentioned a moment ago, the various Forms 29 speak for themselves as to the beneficial ownership of the shares in Ipmuda and this information could readily be obtained by the appellant from the company secretary of Ipmuda. So for this reason, we find that there is really no necessity on the part of the first respondent to comply with the writ of subpoena *duces tecum*.

Following from the above, the only other issue for our consideration in this appeal is whether the first respondent has to comply with the writ of subpoena *ad testificandum* to give oral testimony with regard to the documents sought to be adduced in evidence by the appellant in the light of s 97(1) of BAFIA.

Subpoena ad testificandum

Touching upon the court's jurisdiction to set aside a writ of subpoena *ad testificandum*, we can do no better than to refer to the decision of the then Supreme Court in *Wong Sin Chong & Anor v Bhagwan Singh & Anor* [1993] 3 MLJ 679 (at p 686) where the court, speaking through that eminent judge Mohamed Azmi SCJ (as he then was) had this to say:

> The right of a party to the attendance of witnesses is a crucial part of our judicial system, but the right must be protected against any oppression or abuse. Thus in *Raymond v Tapson* [(1883) 22 Ch D 430], it was held that any party may, without leave of the court, issue a subpoena for the examination of a witness at any stage of an action; but the court will exercise a control over the privilege to prevent it being oppressively used. In that case, the plaintiff had subpoenaed a solicitor, who had acted for both parties in a mortgage transaction, in order to examine him with respect to the moneys received by him on account of both parties. The court held that the plaintiff was entitled to issue the subpoena and to examine the witness. But, where no useful result would be obtained by the attendance of a witness, the subpoena should be refused — see *Re Mundell, Fenton v Cumberlege* [(1883) 52 LJ Ch 756]. At p 452, *Mallal's Supreme Court Practice* (2nd Ed), citing *Raymond v Tapson* as authority, it is stated that:
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> > 'An oppressive subpoena (for purposes of annoyance, or in spite, to a man's wife or unmarried daughters and the like) will be set aside by the court, on application on behalf of the witness, as being an abuse of the party's privilege to issue a subpoena without leave.'
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> It is further stated at p 453 that:
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> > 'The court has inherent jurisdiction to set aside a subpoena which is issued from an improper motive and not for obtaining relevant evidence, and there is no distinction, on the point, between civil and criminal proceedings: *R v Baines* [1909] 1 KB 258.'

Now, coming back to the present appeal before us and in answer to the appellant's grounds of appeal we would say this. If the appellant merely requires the first respondent to testify on what appears on the face of the

said documents, then the first respondent may do so without breaching the secrecy provision of s 97(1) of BAFIA. But this is not the case here. Here, the appellant, as stated at p 162 of the appeal record, wanted to examine the first respondent as to who the beneficial owner of 1,646,000 shares in Ipmuda Bhd is and not merely what appears on the face of the Forms 29. They wanted the first respondent to testify on matters beyond what appears on the face of the documents. A B

This, in our view, would clearly be in breach of s 97(1) of BAFIA. The appellant's contention is that s 97(2) permits such evidence to be given. With due respect to the appellant, we must say that their contention is totally misconceived because the testimony so required of the first respondent goes far beyond what appears on the face of the documents, ie Forms 29, in that such testimony would enable information relating to a particular customer of the bank to be ascertained from it. Certainly, both s 97(1) and (2) of BAFIA prohibit this. Section 97(2) only opens the way for the admission of Forms 29 under the writ of subpoena *duces tecum*. C

Further, we find that the other exceptions to s 97(1) of BAFIA, namely ss 98 and 99 are also not applicable on the facts of the present appeal. In the circumstances, the first respondent is absolutely prohibited from giving oral testimony on matters relating to the accounts of a customer of the bank. We may add that such being the situation, the learned judge does not have any discretionary power to allow disclosure of information if such information is prohibited under s 97(1) of BAFIA. In the absence of such discretionary power on the part of the learned judge, it would be wrong for the appellant to suggest that s 97(1) of BAFIA affords a privilege to information and documents as mentioned in their grounds of appeal. D E

Next, it is the appellant's contention that the learned judge had failed to consider or sufficiently consider the various factors mentioned in paras 2.1–2.5 of their grounds of appeal. In our judgment, such failure on the part of the learned judge would not have in any way affected his decision for the following reasons: F

(1) notwithstanding the relevancy of the evidence sought to be produced through the first respondent, this must necessarily be subjected to any statutory prohibition as to its admissibility; G

(2) further, the first respondent is not the maker of the documents sought to be produced. The various Forms 29 are prepared by the global securities services department of the bank based on the computer records of the bank. As such, the first respondent is not in a position to give any evidence and/or relevant evidence pertaining to such documents and is therefore not in a position to inform the court who the true beneficial owner of 1,646,000 shares in Ipmuda Bhd is if it was other than the person mentioned in the Forms 29. Thus, the evidence sought to be adduced through the first respondent is not the best evidence (see *Tan Siew Sin v Hasnul bin Abdul Hadi; Re application of Tun (Dr) Ismail & Anor* [1967] 2 MLJ 191; *KPM Khidmat Sdn Bhd v Tey Kim Suie* [1994] 2 MLJ 627 and *Chow Siew Woh v Public Prosecutor* [1967] 1 MLJ 228); H I

(3) on the facts of the present appeal, we would say that the persons who are in a better position to testify as to the facts sought by the appellant would be the company secretary of Ipmuda Bhd who would be in possession of the records of its members and their shareholding in Ipmuda Bhd and/or the said Koh Kim Teck himself (the person who appears from the Forms 29 as the beneficial owner of the shares). We notice, at p 176 of the appeal record, that the appellant had conceded that the said Koh Kim Teck was not called as their witness for fear that he would be a hostile witness. Be that as it may, this does not in any way detract from the fact that the said Koh Kim Teck is the best person to testify on matters sought to be adduced through the first respondent;

(4) from the wordings of s 162 of the Evidence Act 1950, it appears to apply only to the production of documents and not to the giving of oral testimony by a witness. Hence, the appellant's contention in respect of this aspect of the said section is again misconceived. We hasten to add that the learned judge need not give any regard to this provision but need only consider s 97(1) of BAFIA in determining whether the first respondent ought to be subpoenaed as a witness to testify on matters relating to an account of a customer of the bank where the bank is not a party to the proceedings. Since the first respondent is absolutely prohibited from testifying on such matters we would view the issuance of the said writ of subpoena as an abuse of the process of court. In consequence, the learned trial judge was therefore absolutely correct in setting aside the writ of subpoena;

(5) the appellant contends that as the documents subpoenaed are not "bankers' books" as defined in s 2 of the Banker's Books (Evidence) Act 1949, s 130(3) of the Evidence Act 1950 has no application in the present circumstances. It must be observed that under the definition, all books relating to the bank's business would be covered under these terms. Further, a proper reading of s 130(3) of the Evidence Act 1950 which stipulates that 'no bank shall be compelled to produce its books in any legal proceeding to which it is not a party' can only lead to the conclusion that bankers cannot be made to divulge any of its books. The bank here is not a party to these proceedings. Once again the appellant has fallen into the error of misconceiving the entire provision.

Lastly, in reply to the appellant's final ground of appeal we would say that the learned judge was correct and justified in setting aside the writ of subpoena issued against the first respondent. His Lordship had taken into consideration the following factors:

(i) that the said writ of subpoena was too wide and unlimited in its scope on the face of it so as to amount to a fishing expedition; and

(ii) that the appellant was not contented with the production of the said documents by the first respondent in the manner set out under O 38 r 16(2) of the RHC.

Before we conclude, we would observe that in the context of the present appeal, the issuance of the writs of subpoena by the appellant to the first respondent is not made bona fide for the purpose of obtaining relevant evidence. For that reason, we find that it amounts to an abuse of the process of court and is oppressive. The learned judge was therefore entitled to set aside the writs of subpoena.

For the reasons we have already given above, we find that these appeals cannot succeed. We therefore dismiss them with costs to the first respondent on a higher scale. We would order that the deposit be paid to the first respondent towards account of taxed costs. We order no costs against the appellant in respect of the second respondent.

My learned brothers Mokhtar Sidin and Mohd Saari JJCA have seen this judgment in draft and have expressed their agreement with it.

Appeal dismissed with costs to the first respondents on a higher scale.

Reported by Chew Phye Ken